

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 42.11.104, 42.11.105,) PROPOSED AMENDMENT AND
42.11.106, 42.11.211, 42.11.213,) REPEAL
42.11.243, 42.11.245, and 42.11.402,)
and the repeal of ARM 42.11.205,)
42.11.212, 42.11.214, 42.11.215, and)
42.11.217 pertaining to liquor vendors)

TO: All Concerned Persons

1. On September 29, 2014, at 1:30 p.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on September 15, 2014. Please contact Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.11.104 WHOLESALE CALCULATION OF POSTED PRICE (1) The ~~wholesale posted price of liquor, other than fortified wine~~ is determined by adding:

(a) ~~the department's base case cost;~~ and adding:

(i) the wholesale price as set forth in (2);

(ii) the liquor excise tax as determined under 16-1-401, MCA; and

(iii) the liquor license tax as determined under 16-1-404, MCA;

(b) ~~the state mark-up of 40 percent~~ dividing the total from (a) by the number of individual units within the case; and

(c) rounding the total from (b) up to the next nickel increment.

(2) The ~~wholesale selling price of fortified wine containing more than 16 percent but no greater than 24 percent alcohol by volume~~ is determined by adding:

(a) adding:

(i) the department's base vendor's current quoted price per case cost; and

(ii) the department's current freight rate per case to agency liquor stores; and

(b) multiplying the total from (a) by the state mark-up of markup as set forth in (3).

(3) Unless a vendor qualifies for a reduced state markup under ARM 42.11.106, the state markup is as follows:

- (a) 40 percent on any liquor other than fortified or sacramental wine;
- (b) 51 percent on fortified wine containing more than 16 but no greater than 24 percent alcohol by volume; and
- (c) 20 percent on sacramental wine containing more than 16 but no greater than 24 percent alcohol by volume.

(3) remains the same, but is renumbered (4).

AUTH: ~~16-1-103~~, 16-1-303, MCA

IMP: ~~16-1-103, 16-1-106, 16-1-302, 16-1-401, 16-1-404, 16-1-411, 16-2-301,~~
MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.104 to create better transparency in how the posted price of liquor is determined. Because "wholesale price" is only one of the components used to determine the posted price of liquor, the department also proposes amending the rule title to better reflect the content of the rule as amended.

Furthermore, the department reviewed the current authorization and implementing statutes as cited for the rule and proposes striking those that serve no purpose or no longer apply.

42.11.105 DEFINITIONS ~~As used in~~ The following definitions apply to subchapters 1, 2, and 4, the following definitions apply:

(1) through (3) remain the same.

~~(4) "Base case cost" as it applies to liquor and fortified wine means the supplier's quoted price and the department's current freight rate to state agency liquor stores.~~

(5) through (12) remain the same, but are renumbered (4) through (11).

~~(13) "Posted price" as it applies to liquor and fortified wine, means the wholesale price of liquor and fortified wine sold to persons holding a liquor license issued by the department, and an excise tax and license tax as provided in Title 16, chapter 1, part 4, MCA, the total of which is rounded up to the next nickel increment.~~

(14) through (23) remain the same, but are renumbered (12) through (21).

AUTH: ~~16-1-103, 16-1-104~~, 16-1-303, MCA

IMP: ~~16-1-103, 16-1-104, 16-1-302, 16-1-401, 16-1-404, 16-1-411, 16-2-101, 16-2-201, 16-2-301, 16-3-107,~~ MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.105 to strike the term "base case cost" because it is no longer used in a rule and to strike the term "posted price" because it is already defined in statute.

Furthermore, the department reviewed the current authorization and implementing statutes as cited for the rule and proposes striking those that serve no purpose or no longer apply.

42.11.106 REDUCTION IN STATE ~~MARK-UP~~ MARKUP FOR DISTILLERIES

AT OR BELOW 25,000 PROOF GALLONS (1) For purposes of applying 16-2-211, MCA, a reduced ~~mark-up~~ markup rate of 20 percent will be applied to all liquor products acquired from a distillery that manufactures, distills, rectifies, bottles, or processes 25,000 proof gallons or less of liquor nationwide annually.

(2) The 20 percent reduced ~~mark-up~~ markup rate is determined using a 100 percent reduction in ~~mark-up~~ markup after agency liquor store commissions and discount costs and the costs to operate the state liquor warehouse have been accounted for. These costs account for half of the standard ~~mark-up~~ markup normally collected on product sold by the department. The department will annually review the associated agency liquor store commissions and discount rate costs and the costs to operate the state liquor warehouse to ensure these costs do not exceed the reduced ~~mark-up~~ markup. The department will publish any adjustments to the reduced ~~mark-up~~ markup based on the results of the annual review.

(3) A distillery requesting a reduction in the state ~~mark-up~~ markup must certify with a sworn statement, on a form supplied by the department, that the number of proof gallons they have manufactured, distilled, rectified, bottled, or processed nationwide annually is at or below the 25,000 proof gallon threshold.

(4) A distillery requesting a reduced ~~mark-up~~ markup rate must submit this form and meet the specified requirements at the time of initially registering with the department and by February 15 of each of the following calendar years in order to receive the reduced ~~mark-up~~ markup rate.

(5) The following effective dates will apply for those distilleries that meet the reduced ~~mark-up~~ markup rate criteria:

(a) the department will apply the reduced ~~mark-up~~ markup rate to existing liquor products effective November 1, 2011;

(b) for each liquor product introduced thereafter, the distillery's current applicable ~~mark-up~~ markup rate will apply with an immediate effective date;

(c) each subsequent year, the distillery's applicable ~~mark-up~~ markup rate will be effective May 1 with the department's May, June, and July quarterly price book or the next available price book if the form is submitted after the February 15 annual deadline; and

(d) failure to submit the form annually to the department by February 15 will result in a 40 percent ~~mark-up~~ markup rate for liquor products, 20 percent for sacramental wine products, and 51 percent for fortified wine products.

(6) and (7) remain the same.

AUTH: ~~16-1-403, 16-1-303, 16-2-211,~~ MCA

IMP: 16-2-211, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.106 to change "mark-up" to "markup" for formatting consistency with other rules and statutes.

Furthermore, the department reviewed the current authorization statutes as cited for the rule and proposes striking those that serve no purpose or no longer apply.

42.11.211 REGISTRATION OF VENDOR REPRESENTATIVES (1) A vendor ~~must~~ who desires to promote the sale of its liquor in Montana shall register a

at least one representative with the department in accordance with the provisions of ARM 42.11.212 through 42.11.215. A vendor may register a maximum of three representatives.

(2) ~~No person may be registered as a representative if he or she:~~
(a) ~~has a direct or indirect financial interest in:~~
(i) ~~an alcoholic beverage retail license;~~
(ii) ~~a state agency liquor store;~~
(iii) ~~a beer wholesaler's license;~~
(iv) ~~a table wine distributor's license;~~
(v) ~~a brewery; or~~
(vi) ~~a licensed winery;~~
(b) ~~is an officer, director, agent, or employee of an alcoholic beverage retail licensee, licensed beer wholesaler, table wine distributor, brewer, or licensed winery;~~
(c) ~~is under the age of 18 years;~~
(d) ~~has a history that would affect the performance of the representative; or~~
(e) ~~is a nonresident of Montana~~ Liquor may only be promoted by the vendor's registered representative or a party accompanied by the vendor's registered representative, except as provided in (8).

(3) ~~Individuals seeking registration as a representative must submit a properly completed application to the department and supply proof of residency, as per 16-3-107, MCA. The completed application, proof of residency, and the requirements in (2) will be reviewed by the department for the purpose of approving a registration of representative~~ An applicant seeking to represent a vendor must submit an application and the vendor representative registration fee.

(4) ~~An application to register a representative must be signed by the vendor or an official of the vendor or the vendor's broker~~ The department shall approve an application upon determining that the applicant:

(a) possesses no ownership interest in any Montana alcoholic beverage retail license or a state agency liquor store;

(b) is 18 years of age or older; and

(c) is a resident of Montana.

(5) ~~Registration of a representative~~ A representative's registration is effective upon the department's approval by the department of the application. All registrations expire on September 30.

(6) ~~In addition to the definition of "resident" found in ARM Title 42, chapter 2, evidence of residency includes:~~

(a) ~~qualification to vote in a Montana election;~~

(b) ~~filing a Montana income tax return; or~~

(c) ~~having a current Montana driver's license~~ A representative seeking registration renewal shall submit a renewal application and the vendor representative registration fee, postmarked by September 1.

(7) The department shall cancel the registration of a vendor's representative if requested in writing by the vendor.

(8) A vendor shall fill the one required representative position within 60 days of a vacancy. To promote its liquor during this 60-day period, the vendor must provide the department with advance written notice identifying the unregistered representative.

(9) The annual registration fee for each vendor representative is \$50. This fee must be paid when the applicant first seeks approval to represent a vendor and upon each renewal of the registration thereafter.

AUTH: 16-1-103, 16-1-303, MCA

IMP: 16-3-103, 16-3-107, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.211 to revise the structure of the rule for improved readability, and to incorporate vendor representative and representative fee information currently found in other rules. The department's intent is to reduce the number of rules regarding similar subject matter by repealing rules with related or redundant content and relocating the relevant information into a single rule.

The department also proposes increasing the vendor representative registration fee and the annual renewal fees, which have existed unchanged since the mid-1970s, from \$25 to \$50. The department determined that this increase is necessary to more closely align the fees with present costs associated with processing vendor representative applications.

The department has determined that the proposed fee increase will impact 14 Montana distilleries with approximately 30 representatives between them, for a total combined increase in revenue of \$750 annually. For the nearly 100 out-of-state vendors, the industry increase for the vendor registration fee will be approximately \$7,425. With the data available it is not possible to determine which out-of-state vendors are small businesses. Therefore, this estimate includes all of the out-of-state vendors currently paying the vendor representative registration fee in Montana.

The department further proposes amending the title to better reflect the amended rule content, and striking an unnecessary authorization statute citation from the rule.

42.11.213 APPLICATION FOR VENDOR PERMIT (1) A vendor who desires to promote the sale of the vendor's brands of its liquor in Montana shall obtain a through a representative must be the holder of a Montana vendor permit from the department. To hold a permit, vendors must register at least one representative in accordance with ARM 42.11.211 through 42.11.215. The vendor shall apply for the registration of a representative on forms provided by the department.

(2) In considering an application for a vendor permit, the department shall review all matters pertaining to the general reputation of the vendor. An applicant for a vendor permit must submit an application and the vendor permit fee.

(3) The department shall deny an application upon determining that the applicant possesses an ownership interest in any Montana alcoholic beverage retail license or state agency liquor store.

(4) A vendor permit is effective upon the department's approval of the application. All vendor permits expire on September 30.

(5) A vendor seeking renewal of its vendor permit shall submit a renewal application and the vendor permit fee, postmarked by September 1.

(6) The annual vendor permit fee is based upon the total number of cases the vendor sold to the department during the preceding fiscal year (July 1 to June 30) as

follows:

- (a) 0-24 cases = no charge;
- (b) 25-100 cases = \$100;
- (c) 101-1,000 cases = \$200;
- (d) 1,001 - 2,000 cases = \$300; and
- (e) 2,001 or more cases = \$400.

AUTH: 16-1-303, MCA

IMP: 16-3-103, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.213 to provide more information about the permit required for vendors to promote liquor in Montana; to revise the structure of the rule for improved readability; and to incorporate related vendor permit information currently found in other rules. The department's intent is to reduce the number of rules regarding similar subject matter by repealing rules with redundant content and relocating the relevant information into other rules where appropriate.

The department also proposes changing the annual vendor permit fee from a \$100 flat fee, which has existed unchanged since 2001, to a progressive fee schedule based upon volume sold. This proposed change will bring the vendor permit fee more in line with the fees charged to foreign wineries and wine importers.

The department has determined that the proposed sliding scale fee schedule will impact 14 Montana distilleries. Five will pay less than \$200; seven will have an increase to \$200, and two will pay more than \$200, for a combined total increase of \$900. For the nearly 100 out-of-state vendors, the industry increase for the vendor permit fee will be approximately \$8,900. Forty-two will pay less than \$200; 26 will pay \$200; and 31 will pay more than \$200. With the data available it is not possible to determine which out-of-state vendors are small businesses. Therefore, this estimate includes all of the out-of-state vendors currently paying the vendor permit fee in Montana.

The department further proposes to amend the title to better reflect the rule content as amended.

42.11.243 SAMPLES (1) through (8) remain the same.

(9) Sample products must meet the following criteria:

(a) samples are limited to ~~bottles~~ primary packaging containing no more than 750 milliliters; and

(b) through (10) remain the same.

(11) In order to distribute samples, the vendor's representatives must be registered as required under ARM 42.11.211, and the vendor must hold a current vendor permit as required under ARM 42.11.213.

AUTH: ~~16-1-103~~, 16-1-303, MCA

IMP: 16-3-103, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.243 to replace the term "bottles" with "primary packaging" in (9), because

bottles are not the only type of container approved for use with distilled spirits. "Primary packaging" is defined in ARM 42.11.105 and provides for the approved container types.

The department also proposes adding new (11) as a reminder within the samples rule that a vendor must register its representatives and hold a current vendor permit to distribute samples in the state.

The department further proposes striking an unnecessary authorization statute citation from the rule.

42.11.245 ADVERTISING SPECIALTIES (1) remains the same.

(2) Registered representatives may not directly or indirectly pay or credit the retailer for using ~~or distributing~~ these materials ~~or for any expense incidental to their use~~.

AUTH: ~~16-1-103~~, 16-1-303, MCA

IMP: ~~2-4-307~~, 16-3-103, MCA

REASONABLE NECESSITY: The department proposes amending the language in ARM 42.11.245 for clarity by striking "or distributing" and "or for any expense incidental to their use" from (2).

While registered representatives are permitted to distribute point of sale advertising materials and consumer advertising specialties to retailers for use in their establishments (without also providing any type of compensation), the retailers are not permitted to redistribute the materials because they are not registered or allowed to promote products. The rule does not otherwise prohibit the retailer from using the advertising materials or specialties in their establishment as intended.

Furthermore, the department reviewed the current authorization and implementing statutes as cited for the rule and proposes striking those that serve no purpose or no longer apply.

42.11.402 INVENTORY POLICY (1) remains the same.

(2) Each product a vendor desires to sell in the state of Montana must be approved by the department ~~prior to being accepted into the state liquor warehouse~~. In order to consider the product for approval, the department must receive a picture copy of the product's primary packaging.

(3) and (4) remain the same.

AUTH: ~~16-1-103~~, 16-1-303, MCA

IMP: ~~16-1-103~~, 16-1-104, 16-1-302, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.11.402 to clarify that the rule pertains to all liquor sold in the state and not just product shipped through the state liquor warehouse.

Furthermore, the department reviewed the current authorization and implementing statutes as cited for the rule and proposes striking any that serve no purpose or no longer apply.

4. The department proposes to repeal the following rules:

42.11.205 VENDORS' EMPLOYMENT OF REPRESENTATIVES

AUTH: 16-1-103, 16-1-303, MCA

IMP: 16-3-103, 16-3-107, MCA

REASONABLE NECESSITY: The department proposes repealing ARM 42.11.205 and relocating information regarding vendor representatives to ARM 42.11.211. It is the department's intention to eliminate redundancy and improve the readability of the rules by providing all information about vendor representatives in a single rule.

42.11.212 RESTRICTION ON NUMBER OF REPRESENTATIVES

AUTH: 16-1-103, 16-1-303, MCA

IMP: 16-3-103, 16-3-107, MCA

REASONABLE NECESSITY: The department proposes repealing ARM 42.11.212 and relocating information regarding vendor representatives to ARM 42.11.211. It is the department's intention to eliminate redundancy and improve the readability of the rules by providing all information about vendor representatives in a single rule.

42.11.214 PERMIT AND REGISTRATION FEES

AUTH: 16-1-303, MCA

IMP: 16-3-103, MCA

REASONABLE NECESSITY: The department proposes repealing ARM 42.11.214 and relocating information regarding vendor representatives to ARM 42.11.211 and relocating information regarding vendor permits to ARM 42.11.213. It is the department's intention to eliminate redundancy and improve the readability of the rules by providing all information about vendor representatives in one rule and all information about vendor permits in another rule.

42.11.215 EXPIRATION AND RENEWAL OF REGISTRATION

AUTH: 16-1-303, MCA

IMP: 16-3-103, MCA

REASONABLE NECESSITY: The department proposes repealing ARM 42.11.215 and relocating information regarding vendor representatives to ARM 42.11.211 and relocating information regarding vendor permits to ARM 42.11.213. It is the department's intention to eliminate redundancy and improve the readability of the rules by providing all information about vendor representatives in one rule and all information about vendor permits in another rule.

42.11.217 CANCELLATION OF REGISTRATION

AUTH: 16-1-103, 16-1-303, MCA

IMP: 16-3-107

REASONABLE NECESSITY: The department proposes repealing ARM 42.11.217 and relocating information regarding vendor representatives to ARM 42.11.211. It is the department's intention to eliminate redundancy and improve the readability of the rules by providing all information about vendor representatives in a single rule.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov and must be received no later than October 10, 2014.

6. Laurie Logan, Department of Revenue, Director's Office, has been designated to preside over and conduct this hearing.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at revenue.mt.gov. Select the Administrative Rules link under the Other Resources section located in the body of the homepage, and open the Proposal Notices section within. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of ARM 42.11.211 and 42.11.213 will directly but not significantly impact a small number of small businesses. The department has

determined that the amendment and repeal of the remaining rules herein will not significantly and directly impact small businesses. Documentation of the department's determination is available upon request from the person in 5.

/s/ Laurie Logan

Laurie Logan
Rule Reviewer

/s/ Mike Kadas

Mike Kadas
Director of Revenue

Certified to the Secretary of State August 25, 2014.